95-7452 (2)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

- - - - - - - - - - -

KENNETH LYNCE,

Petitioner,

v.

HAMILTON MATHIS
ROBERT BUTTERWORTH

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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47 pp

Questions Presented for Review

Petitioner, Kenneth Lynce, contends the United States Court of Appeals, erred in denying his request for a certificate of probable cause.[1] He maintains his petition makes a substantial showing of the denial of a federal right, to wit: A violation of the *Ex Post Facto* Clause by the state's cancellation of petitioner's previously granted early release credits and retroactive application of offense-based exclusions from eligibility.

Further, the petitioner contends issues related to this question are debatable and adequate for further proceedings. This Court currently has other similar cases pending, involving the same issues as presented here on appeal from the United States Court of Appeals for the Eleventh Circuit: *Hock v. Singletary*; *Magnotti v. Singletary*, filed with this Court respectively in August and November 1995.

Thus, a certificate of probable cause was justified and should have been issued to answer the following questions:

1. Does the *Ex Post Facto* Clause forbid a state to cancel a prisoner's previously granted early-release credits and nondiscretionary release date through the retroactive application of offense-based exclusions from eligibility?

2. Does a state legislature deprive a prisoner of liberty without due process of law by destroying lawfully granted early-release credits and a lawfully established early-release date without providing adjudicatory procedures and in the absence of substantive justification other than the nature of the prisoner's antecedent offense.

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[1]Kenneth Lynce v. Hamilton Mathis, Superintendent, Tomoke Correctional Institution, and Robert Butterworth, Attorney General, State of Florida

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Opinion Below

On October 12, 1995, the United States Court of Appeals for the Eleventh Circuit, issued an order without opinion, denying Petitioner's Application for a Certificate of Probable Cause. Mr. Lynce is serving a 22 year sentence in the Florida Department of Corrections.

Grounds for Jurisdiction

Grounds for invoking jurisdiction of this Court:

i.. The judgment of the United States Court of Appeals for the Eleventh Circuit of which review is sought was entered on October 12, 1995, denying Petitioner's Application for Certificate of Probable Cause.

ii. This petition is timely filed within the prescribed ninety days from the judgment rendered, pursuant to United States Supreme Court Rule 13.1, and this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved herein follows:

U.S. CONST. art I, § 10, cl. 1 provides in pertinent part that:

"No State shall ... pass any ... ex post facto Law ... "

U.S. CONST. amend XIV, § 1 provides in pertinent part that:

"[N]or shall any State deprive any person of life, liberty or property, without due process of law ... "

The following Florida Statutes are reproduced in the Appendix:

§ 921.001, Fla. Stat. (Supp. 1986)

§ 921.001(9)(b), Fla. Stat. (1993)

§ 921.001(10)(b), Fla. Stat. (1987)

§ 921.001(11)(d), Fla. Stat. (Supp. 1988)

§ 944.276, Fla. Stat. (1987)

§ 944.277, Fla. Stat. (Supp. 1988)

§ 944.277, Fla. Stat. (Supp. 1992)

§ 944.598, Fla. Stat. (Supp. 1986)

STATEMENT OF THE CASE

The State of Florida convicted Petitioner Lynce of attempted first degree murder and other offenses on April 14, 1986. He was sentenced to a term of 22 years imprisonment. He became eligible for "provisional gain time" or early-release credits under § 944.277, Fla. Stat. (Supp. 1988), which authorized his release on October 1, 1992. After being released, the law was changed by amendment, see § 944.277, Fla. Stat. (Supp. 1992), and a subsequent interpretation by the Florida Attorney General's office authorized a retroactive application and cancellation of all petitioner's previously earned 1860 days of early release credits.

Thus, Mr. Lynce was arrested in June 8, 1993, and sent back to prison, due to this retroactive cancellation of his early release credits. His release date was changed from October 1, 1992, to May 19, 1998. Petitioner has claimed his release date is November 5, 1998. His sentence of imprisonment was increased by the revocation of all provisional gain time previously authorized under §944.277 and § 921.001, Fla. Stat. (Supp. 1988).

This petition was filed on August 18, 1994. My Lynce challenged the application of the 1992 law to him as *ex post facto* and as a denial of due process. The District Court approved the United States Magistrate Judge's Report and Recommendation of March 14, 1995, and dismissed the petition on May 10, 1995. This Report primarily relied on the case of *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), for denial of this petition. The *Hock* case is now pending before this Court, as is the case of *Magnotti v. Singletary*.

Petitioner Lynce filed for a certificate of probable cause in the District Court which was

denied on June 16, 1995. An appeal to the Eleventh Circuit proved futile and on October 12, 1995, the application for a certificate for probable cause was denied. This petition was filed to seek further relief.

Basis for Federal Jurisdiction

Original jurisdiction of the district court was invoked under 28 U.S.C. § 2254. Review of that court's judgment was sought by appeal to the United States Court of appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291. This petition follows.

REASONS FOR GRANTING THE WRIT

Petitioner requests this Court grant a certificate of probable cause and allow an appeal on the merits. The denial of the petition was based upon the case of *Hock v. Singletary, Supra*. The analysis of this case decided by the Eleventh Circuit conflicts substantially with the *ex post facto* analysis mandated by this Court's subsequent decision in *California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995). The Eleventh Circuit did not have the benefit of the *Morales* opinion when it rejected Mr. Hock's *ex post facto* claim.

Nowhere do the precedents of this Court recognize a "procedural" or "administrative convenience" exception to the *Ex Post Facto* Clause. In its broadly worded and confusing creation of such an exception, the opinion in *Hock* conflicts directly with *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991), and *Ex parte Rutledge*, 741 S.W.2d 460 (Tex. Crim. App. 1987)(*en banc*). It also conflicts with the reasoning and holdings of this Court in *Morales, Miller v. Florida*, 482 U.S. 423 (1987); *Weaver v. Graham*, 450 U.S. 24 (1981), and *Lindsey v.*

Washington, 301 U.S. 397 (1937).

This Court held in *Weaver v. Graham*, 450 U.S. 24 (1981), and other cases that retroactive reductions in substantial opportunities for early release violate the *Ex Post Facto* Clause. In numerous cases culminating in the *Morales* case, the Court has firmly established that a retroactive increase in the effective term of confinement is *ex post facto*. The judgment below conflicts with *Weaver*, and it strongly conflicts in principle with *Morales; Collins v. Youngblood*, 497 U.S. 37 (1990), and earlier opinions of this Court.

The judgment of the lower court also conflicts directly with *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991), and *Ex parte Rutledge*. Unlike the Eleventh Circuit, which upheld the cancellation of Petitioner's credits and nondiscretionary release date, the Tenth Circuit and Texas courts recognize that retroactive ineligibility for early-release credits designed in part to control the prison population have the prohibited effect of increasing punishment.

The *ex post facto* question is of great constitutional and practical importance. Numerous states employ, and the durations of thousands of criminal sentences are affected by, mechanisms surrounding the sentence that shorten the duration of incarceration. The Eleventh Circuit has erred on this important question by exempting early-release laws, essentially on grounds of administrative convenience, from the constraints of the *Ex Post Facto* Clause.

I. THE JUDGMENT OF THE ELEVENTH CIRCUIT CONFLICTS DIRECTLY WITH *WEAVER v. GRAHAM* AND CONFLICTS IN PRINCIPLE WITH *CALIFORNIA DEPARTMENT OF CORRECTIONS v. MORALES*.

The judgment of the court below relying on *Hock*, is in substantial conflict with each of this Court's opinions applying the *Ex Post Facto* Clause to retroactive increases in punishment.

It conflicts directly with *Weaver v. Graham* and *Greenfield v. Scafati*, 277 F. Supp. (D. Mass. 1967)(three-judge court), *summarily aff'd*, 390 U.S. 713 (1968). On fundamental *ex post facto* principles it conflicts with *California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995), *Miller v. Florida*, 482 U.S. 423 (1987), *Lindsey v. Washington*, 301 U.S. 397 (1937), and other authority. Given the clarity and consistency of the Court's precedents, summary reversal pursuant to Rule 16.1 would be appropriate.

The conflict with *Weaver v. Graham* and *Greenfield v. Scafati* is direct. In *Weaver*, this Court struck down as *ex post facto* a retroactive Florida law that potentially added over two years to the actual duration of the prisoner's confinement. *Weaver*, 450 U.S. at 27 n. 6. The 1979 law held unconstitutional in *Weaver* was reduced the amount of basic gain-time the Secretary was required to deduct from the prisoner's sentence. *Id.* at 26. Basic gain-time was a determinant of the actual duration of the prisoner's confinement. *Id.* at 31-32. The Court held that the new law "constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment." *Id.* at 35-36. The cancellation of Mr. Lynce's 1860 days of early-release credits and his October 1, 1992, effected an increase in the actual duration of his incarceration that was both greater and more certain than the increase held unconstitutional in *Weaver*.

There can be no clearer *ex post facto* violation under *Weaver* than the State's increase -- after releasing petitioner on October 1, 1992 -- Mr. Lynce's incarceration by over five years and solely by reason of his 1986 conviction for attempted first degree murder. Where *Weaver* and *Greenfield* were concerned with the potential effects of generally applicable amendments, this case presents an actual, fully quantified increase in the duration of confinement based explicitly

on the nature of the prisoner's antecedent offense. The judgment below directly conflicts with *Weaver* and *Greenfield*.

In addition to the direct conflict with *Weaver*, the lower court's judgment repudiated the constitutional principles established by each of this Court's opinions analyzing the effects of retroactive laws on punishment. The lower court's rejection of Mr. Lynce's claim conflicts with the following *ex post facto* principles:

1. A law that is asserted procedural in name or form is *ex post facto* if it retroactively increases punishment.

According to the court below the retroactive cancellation by law of a known quantity of early-release credits and an established release date, solely by reason of the prisoner's antecedent offense, is "procedural" and, therefore, not *ex post facto*. (See my Report as App.). This rational conflicts with this Court's consistent understanding that the *Ex Post Facto* Clause prohibits the retroactive application of procedural laws that effectively increase the actual duration of confinement. "[B]y simply labelling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. Subtle *ex post facto* violations are no more permissible than overt ones....[t]he constitutional prohibition is addressed to laws, whatever their form, which...increase the punishment." *Collins v. Youngblood*, 497 U.S. 37, 46 (1990)(citations and internal quotation omitted).

Just last term the Court, by fully analyzing the potential effects of a procedural law, made it clear that the *ex post facto* prohibition applies with full force to any law, "procedural" or otherwise, that affects punishment. *See California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995)(assessing in detail the potential effects of a law governing the timing of parole

suitability hearings without employing the term "procedural"). The mere characterization of a law as "procedural" is, standing alone, not dispositive of an *ex post facto* claim. *Miller v. Florida*, 482 U.S. 423, 233 (1987); *Weaver v. Graham*, 450 U.S. 24, 36 n.21 (1981). The judgment below conflicts with this well-established principle.

2. The ex post facto analysis must focus on the concrete effects of the challenged law.

The entire thrust of this Court's recent opinion in *California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995), is that the *Ex Post Facto* Clause requires an analysis of the effects of the new law on the actual duration of imprisonment.. In the course of its detailed analysis of the California law that altered the frequency of parole suitability hearings, the Court repeatedly emphasized that it could not discern the effects prohibited by the *Ex Post Facto* Clause: a substantial risk of increasing the actual duration of confinement. *Id.* at 1603, n.4, 1604, 1605. *Morales* confirms that the constitutional standard applicable to Mr. Lynce's claim is whether the 1992 Florida law effectively increases his confinement. *Id.* at 1603 n.4. *See also Weaver*, 450 U.S. at 32 n.17.

The lower court refuses to apply that standard. The 1992 Florida law obviously extended -- and was intended to extend -- Mr. Lynce's actual period of confinement by 1860 days; it extended his operative release date pursuant to Section 921.001 from October 1, 1992 to tentatively May 19, 1998 or November 5, 1998. That increase in the actual period of confinement is precisely the effect that the *Ex Post Facto* Clause, as interpreted by *Morales* and its forbears, prohibits. By ignoring that effective increase, the lower court's judgment conflicts with the most fundamental premise of *Morales, Miller v. Florida*, 482 U.S. 423 (1987), *Weaver*

v. Graham, 450 U.S. 24 (1981), and *Lindsey v. Washington*, 301 U.S. 397 (1937).

3. The prohibition against *ex post facto* laws applies to adjustments to procedures surrounding the sentence

The lower court ignores the obvious increase in Mr. Lynce's confinement by asserting that "provisional gain-time is in no sense tied to any aspect of the original sentence." The court's evasive rationale substantially conflicts with basic *ex post facto* principles.

Each of this Court's relevant opinions emphasized that the *ex post facto* prohibition extends to early-release and other laws that effectively increase punishment, even if those laws are not sentencing laws, narrowly conceived. *See Miller*, 482 U.S. at 432-33; *Weaver*, 450 U.S. at 31-33; *Lindsey*, 301 U.S. at 401-02. *Morales* expressly confirms this basic principle by performing an effects-oriented analysis of a parole law. *Morales*, 115 S.Ct. at 1603 n.4, 1602-05. The lower court flouts it.

Although the lower court's assertion that early-release is not "tied to the original sentence" is contrary to law and fact, this Court's longstanding interpretations of the *Ex Post Facto* Clause render it constitutionally irrelevant. *Ex post facto* constraints clearly apply to the alteration of a fixed release date, the date on which the sentence of imprisonment effectively ends.

Incarceration is punishment, and longer incarceration is greater punishment. By canceling Mr. Lynce's credits and release date, § 944.277(1)(i), Florida Statutes (Supp. 1992), increased the actual duration of Mr. Lynce's confinement. The judgment of the lower court upholding the 1992 law conflicts with *Weaver* and the principles firmly established by *Morales* and numerous other cases. For this reason alone the Court should grant certiorari to reverse judgment.

II. THE OPINION OF THE COURT OF APPEALS CONFLICTS DIRECTLY WITH JUDGMENTS OF THE TENTH CIRCUIT AND STATE COURTS.

Petitioner Lynce claims that the *Ex Post Facto* Clause constrains the State to determine his eligibility for overcrowding-related release credits and to calculate his actual release date in accordance with the law in effect at the time of his offense or its substantial equivalent. In *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991), the court upheld an identical claim made by an Oklahoma prisoner. Similar claims were upheld in *Ex parte Rutledge*, 741 S.W.2d 460 (Tex.Crim.App. 1987)(*en banc*). *See Story v. Collins*, 920 F.2d 1247, 1251-52, 1252 n.1 (5th Cir. 1991)(discussing Texas cases). The judgment of the Eleventh Circuit conflicts with these cases.

In *Arnold* the Tenth Circuit held that 1989 amendments to the Oklahoma Prison Overcrowding Emergency Powers Act, which excluded any prisoner denied parole from eligibility for overcrowding-related "emergency time credits," were *ex post facto* as applied to *Arnold*. *Arnold*, 951 F.2d at 281, 283. The court, expressly disagreeing with the reasoning of an Oklahoma appellate court, concluded there is no constitutionally significant distinction between eligibility for good-time credits and eligibility for overcrowding-related credits; both shorten the duration of confinement. *Id.* at 282-83. The only discernible purpose and effect of the 1989 exclusions from eligibility were to increase the duration of confinement of the retroactively excluded offenders. *Id.* at 283. For the Tenth Circuit, therefore, it is the effect of making punishment for antecedent crimes more onerous than condemns the new law as *ex post facto*. The Texas court's interpretation of the *Ex Post Facto* Clause is substantially similar. *Rutledge*, S.W. 2d at 462.

The lowers court's analysis in this case, in contrast, strains to overlook the predictable and intended effects of the 1992 law on the actual duration of incarceration. The court below first

avoids any analysis of the effects of the law by labeling it "procedural." (*Citing Dugger v. Rodrick*, 584 So.2d 2, (Fla. 1991), *cert. denied*, 502 U.S. 1037 (1992)). Then, ignoring the undisputed facts that provisional release credits shorten the duration of confinement and advance a mandatory release date, the court states wrongly that the credits are not tied to the original sentence. Thus, in the Eleventh Circuit even the obvious effects of the new law on the mandatory release date and the actual duration of imprisonment are deemed to be constitutionally irrelevant.

All of this Court's *ex post facto* holdings, from *Lindsey v. Washington*, 301 U.S. 397 (1937), through *Morales*, direct the lower court to focus their analyses of sentencing-related laws on the potential effects of the new law on the actual duration of confinement. *Arnold* and *Rutledge* are faithful to the command; the judgment below is not. The rationale and result of the lower court's disposition directly conflict with *Arnold* and *Rutledge*, introduce confusion and instability into *ex post facto* doctrine, and materially harm numerous people.

The Court should grant *certiorari* to resolve the conflicts and reaffirm the applicability of *ex post facto* constraints to retroactive adjustments to mechanisms surrounding the sentencing process that increase the actual duration of confinement.

CONCLUSION

The petition for a writ of certiorari should be granted and a certificate of probable cause issued. Furthermore, relief on the merits is also requested by an order restoring petitioners early-release credits, revoked by the *ex post facto* violation herein.

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Counsel for Petitioner KENNETH LYNCE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

OCT 12 1995

NO. 95-2773

KENNETH LYNCE,

Petitioner-Appellant,

versus

HAMILTON MATHIS, Superintendent;
ROBERT A. BUTTERWORTH, Attorney General of the State of Florida;
HARRY K. SINGLETARY, JR., as Secretary of the Florida Department of Corrections,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

Appellant's application for a certificate of probable cause is DENIED.

UNITED STATES CIRCUIT JUDGE

CIV 91
(Rev 5/85)

PD

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT: MIDDLE DISTRICT OF FLORIDA/ORLANDO DIVISION
CASE TITLE: KENNETH LYNCE V. HAMILTON MATHIS, et al	DOCKET NUMBER: 94-891-Civ-Orl-18
	NAME OF JUDGE: Judge G. Kendall Sharp

FILED
95 MAY 10 PM 12:10

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court with the judge named above presiding. and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Petitioner, Kenneth Lynce take nothing and the action be dismissed.

COPIES MAILED TO:

Joel T. Remland, Esquire
Susan A. Maher, Esquire

DOCKET ENTRY ROLL # 88
DOCUMENT # 488

CLERK	DATE
DAVID L. EDWARDS	May 10, 1995
(BY) DEPUTY CLERK	

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CLERK U.S. DIST COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KENNETH LYNCE,

Petitioners,

-vs-

Case No. 94-891-Civ-Orl-18

HAMILTON MATHIS, et al.,

Respondents.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

I. Status

Petitioner initiated this action for habeas corpus relief pursuant to 28 U.S.C. § 2254 on August 18, 1994 (Doc. No. 1). Upon consideration of the petition, the Court ordered Respondents to show cause why the relief sought in the petition should not be granted. Respondents filed a reply to the petition in accordance with the Court's instructions and Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (Doc. No. 22, filed March 6, 1995). Petitioner alleged only one claim for relief, that the State's retroactive application of its provisional release credits statute was an *ex post facto* law in violation of Article I, Section 10 of the United States Constitution.

II. Factual Background

Petitioner was convicted of attempted first-degree murder, armed burglary, and possession of a firearm in the commission of a felony on April 14, 1986. He was sentenced to a term of twenty two years imprisonment. Under the State's provisional release credit statute in force at

AO 72A
(Rev. 8/82)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
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KENNETH LYNCE,

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AO 72A
(Rev. 8/82)

10

that time, he was eligible to accumulate credits to shorten his period of incarceration. Fla.Stat. ch. 944.277 (1989). The provisional credits were only to be awarded during periods when the prisoner population of the correctional system approached full capacity, and then only to inmates not convicted of certain enumerated offenses or serving a mandatory minimum sentence. Fla.Stat. ch. 944.277(1) (1989).

From the time of his sentencing to January 1991, Petitioner accumulated 1860 days of provisional release credits. During the 1992 session, the Florida Legislature amended the provisional release credit statute to exclude the award of credits to prisoners convicted of attempted murder. Fla.Stat. ch. 944.277(1) (1992 Supp.). Petitioner's provisional release date, hastened by the 1860 days of credit previously awarded, was therefore set at October 1, 1992. On that date, Petitioner was released from custody.

On December 29, 1992, Robert Butterworth, Attorney General of the State of Florida, issued an opinion interpreting the 1992 amendment of Fla.Stat. ch. 944.277. 92 Op. Att'y Gen. 96 (1992). He found that the provisional release credit statute was adopted as a permissive administrative means for relieving prison overcrowding. He also found that a footnote which had restricted previous amendments to Fla.Stat. ch. 944.277 to prospective effect was not included in the 1992 amendment. He therefore concluded that the 1992 amendment was intended to have retroactive effect, which he believed precluded the award of any provisional release credits to a prisoner convicted of murder.

Harry Singletary, Jr., Secretary of the Florida Department of Corrections, solicited a further opinion from the Attorney General on the interpretation of the amended provisional release statute. On December 31, 1992, the Attorney General clarified his previous opinion and

suggested that provisional release credits awarded before the 1992 amendment of Fla.Stat. ch. 944.277 to inmates convicted of murder should be withdrawn. He also found that, while no court decision compelled the Department of Corrections to recommit previously released prisoners, the department could do so at its own discretion.

Petitioner's provisional release credits were cancelled on January 4, 1993. The Department of Corrections submitted an Affidavit for Retaking Prisoner to the Ninth Judicial Circuit Court on May 3, 1993. On May 17, 1993, the Court issued an Order for Execution of Sentence Imposed and Retaking of Prisoner. Petitioner was returned to incarceration on June 8, 1993. His prior release date of October 1, 1992 was cancelled and his tentative release date was delayed until May 19, 1998.

III. Findings of Fact and Conclusions of Law

Petitioner contends that the cancellation of his accumulated provisional release credits pursuant to the 1992 amendment of Fla.Stat. ch. 944.277, which caused a significant delay in his tentative release date, is an *ex post facto* law in violation of Article I, Section 10 of the United States Constitution. Respondents contend that provisional release credits were an administrative tool to reduce prison overcrowding, not a mitigation of punishment. They also contend that the statute was merely procedural and therefore did not affect the magnitude of punishment imposed for conviction of an offense.

Article I, Section 10 of the United States Constitution states, "No State shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10, cl. 1. The Framers intended the *ex post facto* clause to be a safeguard for the public which would force criminal legislation to provide fair warning of its effects and permit reliance until explicitly changed. *Weaver v. Graham*, 450 U.S.

24, 28 (1981). The prohibition extends to any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. at 28 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867)). Two elements are required for a criminal or penal law to be considered *ex post facto*: it must apply to events occurring before its enactment and it must disadvantage the offender it affects. *Id.* at 29; *Lindsay v. Washington*, 301 U.S. 397, 401 (1937). However, legislation which satisfied both requirements would not violate the *ex post facto* prohibition if the change it effected were merely procedural and did "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Utah*, 110 U.S. 574, 590 (1884); *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

In *Weaver v. Graham*, 450 U.S. 24, 67 L.Ed.2d 17 (1981), the Supreme Court held unconstitutional the application of the amended Florida good time gain-time statute to inmates convicted before the effective date of the statute. The amendment decreased the number of days of gain-time that an inmate could earn per month for good behavior. *See* Fla.Stat. ch. 944.27(1) (1975), Fla.Stat. ch. 944.275(1) (1979). Although previously awarded gain-time was not cancelled or reduced, the new gain-time statute was applied to all inmates in the prison system, including those convicted before the enactment of the amendment. The State of Florida advanced three arguments suggesting that the law was not *ex post facto*: first, it did not impair vested rights; second, on its face, it applied only prospectively; and third, it did not worsen the conditions of incarceration.

The Court rejected the first argument out of hand; vested rights have never been a requirement for protection under the *ex post facto* clause, only under the contracts clause and the

due process clause. *Weaver*, 450 U.S. at 29. As to the second argument, even though the amendment was prospective in form, it was retrospective in effect. "The critical question is whether the law changes the legal consequences of acts completed before its effective date." *Id.* at 31. Prisoners incarcerated for previous conduct would have greater consequences attached to those prior acts, and the law was therefore retrospective. The application to earlier offenders was repugnant to the original meaning of the *ex post facto* clause because an inmate who considered gain-time before entering a guilty plea would have calculated and relied upon a shorter sentence under the then existing statute. *Id.* at 32. Finally, the Court addressed whether the amendment placed the prisoner in a worse position than the prior law. Because a prisoner had less opportunity to shorten his sentence, he would have been materially harmed by the change. *Id.* at 33. The Court did not consider Florida's argument that the alteration was merely procedural, for it substantively changed the gain-time available, not merely the method by which it was assigned.

The Eleventh Circuit turned to the issue of gain-time after Florida again altered the formula for its award. In *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989), the Court held unconstitutional a decrease of the opportunity to earn incentive gain-time. The amended statute provided for increased good behavior gain-time but decreased the amount of incentive gain-time that could be earned by diligent labor. *See* Fla.Stat. 944.275 (1982), Fla.Stat. ch. 944.275 (1983). The net effect for an inmate who labored diligently was a decrease in available gain-time. The State of Florida made three closely related arguments as to why the statute was not *ex post facto*: first, the granting of incentive gain-time was discretionary, while the granting of good behavior gain-time was automatic; second, the granting

of incentive gain-time was discretionary because the duties which allowed an inmate to earn it were a matter of legislative grace; and third, the increase in good behavior gain-time offset the decrease in incentive gain-time.

The Court found that although an inmate had no *right* to gain-time, either good behavior or incentive, the *ex post facto* clause has never required a vested right to be impaired to violate the clause. *Raske*, 876 F.2d at 1499 n.5. In fact, the Court found that both incentive gain-time and good behavior gain-time, which was held subject to the prohibition in *Weaver*, were discretionary. *Id.* Not only did the State have discretion in determining whether good behavior or incentive gain-time would be awarded, it used similar criteria in making the decision. There was therefore no distinction between the two insofar as the *ex post facto* clause was concerned, so the reasoning of *Weaver* applied to incentive gain-time. *Id.* While the work an inmate performed to earn incentive gain-time may have been a matter of legislative grace, if the State afforded the inmate the opportunity to work, it was bound to reward the prisoner for his services with at least as much gain-time as he would have earned at the time of his offense. *Id.* at 1500. Finally, although an inmate might not earn the maximum award of incentive gain-time (and was eligible to earn more good behavior gain-time under the new statute), the denial of the opportunity to do so made the punishment for the prisoner's offense more onerous than when the offense was committed.

In *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), the Eleventh Circuit addressed the 1989 amendment of Florida's control release statute, Fla.Stat. ch. 947.146 (1989). The goal of the control release program, like that of provisional release credits, was to ease the overcrowding of the state correctional system. The 1989 amendment of the control release statute transferred

responsibility for control of the prison population from the Florida Department of Corrections to the Florida Parole Commission and altered prisoner eligibility. Prior to the amendment, prisoners convicted of murder were eligible for control release; after the amendment, they were not.

The Court, reasoning in summary fashion, found that "any disadvantage suffered by the petitioner does not affect punishment and therefore does not violate the Ex Post Facto Clause." *Hock*, 41 F.3d at 1472. In contrast with the alterations in the good behavior gain-time statutes which had been held unconstitutional in *Weaver* and *Raske*, it found that the control release statute was procedural, not substantive. *Id.* The Court agreed with the Florida Supreme Court's interpretation of the *ex post facto* clause, in which it had earlier held that Fla.Stat. ch. 944.277 "was procedural in nature, [and] not directed toward the traditional purposes of punishment." *Dugger v. Roderick*, 584 So.2d 2 (Fla. 1991), *cert. denied sub nom. Roderick v. Singletary*, __U.S.__, 116 L.Ed.2d 790 (1992). It therefore held that retroactive application of the amendment did not run afoul of the *ex post facto* clause.

The Eleventh Circuit then stated that the amendment to the control release statute, unlike changes in good behavior and incentive gain-time statutes, did not deny inmates the ability to reduce their terms of confinement. *Hock*, 41 F.3d at 1472. The control release statute permitted release based upon prison system overcrowding, not diligent inmate labor and good behavior. The former was independent of an prisoner's labors, the latter the fruit of it. The Court also held that good behavior gain time could be predicted and accounted for in entering into a plea bargain and sentencing but control release could not. *Id.* at 1473.

Although the Eleventh Circuit's opinion is sparsely reasoned, it resolves the issues at question. Provisional release credits were merely an earlier alternative to control release as a

means to relieve prison overcrowding. In fact, *Roderick*, the Florida case upon which the Eleventh Circuit relies heavily, dealt with provisional release credits, not control release. Therefore, in all likelihood, were the Eleventh Circuit to have faced the issue of provisional release credits under Fla.Stat. ch. 944.277 instead of the control release statute, it would have held the 1992 amendment not to violate the *ex post facto* clause. Accordingly, the undersigned respectfully recommends that the Petition for Writ of Habeas Corpus filed herein be **DENIED** and that the case be **DISMISSED** with prejudice.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on March 14, 1995.

David A Baker

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Honorable G. Kendall Sharp
Joel T. Remland
Susan A. Maher

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Section 921.001
Florida Statutes (Supp. 1986)
[1986 Fla. Laws ch. 86-273;
1983 Fla. Laws ch. 83-87, § 2]

921.001 Sentencing Commission.—

(1) The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority to establish sentencing criteria and to provide for the imposition of criminal penalties, has determined that it is in the best interest of the state to develop, implement, and revise a uniform sentencing policy in cooperation with the Supreme Court. In furtherance of this cooperative effort, there is created a Sentencing Commission which shall be responsible for the initial development of a statewide system of sentencing guidelines. After final development of a sentencing guidelines system by the Supreme Court, the commission shall evaluate these guidelines periodically and recommend such changes on a continuing basis as are necessary to ensure certainty of punishment as well as fairness to offenders and to citizens of the state.

(2)(a) The commission shall be composed of 15 members, consisting of: two members of the Senate to be appointed by the President of the Senate; two members of the House of Representatives to be appointed by the Speaker of the House of Representatives; the Chief Justice of the Supreme Court or a member of the Supreme Court designated by the Chief Justice; three circuit court judges and one county court judge to be appointed by the Chief Justice of the Supreme Court; and the Attorney General or his

designee. The following members shall be appointed by the Governor: one state attorney recommended by the Florida Prosecuting Attorneys Association; one public defender recommended by the Public Defenders Association; one private attorney recommended by the President of the Florida Bar; and two persons of the Governor's choice. The Chief Justice or the member of the Supreme Court designated by the Chief Justice shall serve as chairman of the commission.

(b) The members of the commission appointed by the Governor, the President of the Senate, and the Speaker of the House of Representatives shall serve 2-year terms, except that the initial appointees shall serve until January 1, 1984. The members appointed by the Chief Justice of the Supreme Court shall serve at his pleasure.

(c) Membership on the commission shall not disqualify a member form holding any other public office or from being employed by a public entity. The Legislature finds and declares that the commission serves a state, county, and municipal purpose and that service on the commission is consistent with a member's principal service in a public office or in public employment.

(d) Members of the commission shall serve without compensation but shall be entitled to be reimbursed for per diem and travel expenses as provided for in s. 112.061.

(e) The office of the State Courts Administrator shall act as staff for the commission and provide all necessary data collection, analysis, and research and support services.

(3) Following the initial development of statewide sentencing guidelines by the court, the commission shall meet annually or at the call of the chairman to review sentencing practices and recommend modifications to the guidelines. In establishing or modifying the sentencing guidelines, the

commission shall take into consideration current sentencing and release practices and correctional resources, including the capacities of local and state correctional facilities, in addition to other relevant factors. For this purpose, the commission is authorized to collect and evaluate data on sentencing practices in the state from each of the judicial circuits.

(4)(a) Upon recommendation of a plan by the commission, the Supreme Court shall develop by September 1, 1983, statewide sentencing guidelines to provide trial court judges with factors to consider and utilize in determining the presumptively appropriate sentences in criminal cases. The statewide sentencing guidelines shall be implemented by October 1, 1983, unless the Legislature affirmatively delays the implementation of such guidelines prior to October 1, 1983. The guidelines shall be applied to all felonies, except capital felonies, committed on or after October 1, 1983, and to all felonies, except capital felonies and life felonies, committed prior to October 1, 1983, for which sentencing occurs after such date when the defendant affirmatively selects to be sentenced pursuant to the provisions of this act.

(b) The commission shall, no later than October 1 of each year, make a recommendation to the members of the Supreme Court, the President of the Senate, and the Speaker of the House of Representatives on the need for changes in the guidelines. Upon receipt of such recommendation, the Supreme Court may within 60 days revise the statewide sentencing guidelines to conform them with all or part of the commission recommendation. However, such revision shall become effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised.

(5) Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to

all other statutory provisions. The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to chapter 924. The extent of departure from a guideline sentence shall not be subject to appellate review.

(6) The sentencing guidelines shall provide that any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial court judge.

(7) The Sentencing Commission and the office of the State Courts Administrator shall conduct ongoing research on the impact of sentencing guidelines adopted by the commission on sentencing practices, the use of imprisonment and alternatives to imprisonment, and plea bargaining. The commission, with the aid of the office of the State Courts Administrator, the department and the Parole and Probation Commission, shall estimate the impact of any proposed sentencing guidelines on future rates of incarceration and levels of prison population. Such estimates shall be based in part on historical data of sentencing practices which have been accumulated by the office of the State Courts Administrator and on department records reflecting average time served for offenses covered by the proposed guidelines. Projections of impact shall be reviewed by the commission and made available to other appropriate agencies of state government, including the Legislature, by December 15 of each year.

(8) A person convicted of crimes committed on or after October 1, 1983, or any other person sentenced pursuant to sentencing guidelines adopted under this section shall be released from incarceration only:

(a) Upon expiration of his sentence;

(b) Upon expiration of his sentence as reduced by accumulated gain-time; or

(c) As directed by an executive order granting

clemency.

The provisions of chapter 947 shall not be applied to such person.

History. - ss. 1,2,3, ch. 82-145; s. 2, ch. 83-87; s. 176, ch. 83-216; s. 2, ch. 84-328; s. 1, ch. 86-273.

Section 921.001(9)
Florida Statutes (1993)
[1993 Fla. Laws ch. 93-406, § 5]

[1]**921.001 Sentencing Commission and sentencing guidelines generally.—**

(9)(a) The Sentencing Commission and the office of the State Courts Administrator shall conduct ongoing research on the impact of the sentencing guidelines, the use of imprisonment and alternatives to imprisonment, and plea bargaining. The commission, with the aid of the office of the State Courts Administrator, the Department of Corrections, and the Parole Commission, shall estimate the impact of any proposed changes to the sentencing guidelines on future rates of incarceration and levels of prison population, based in part on historical data of sentencing practices which have been accumulated by the office of the State Courts Administrator and on Department of Corrections records reflecting average time served for offenses covered by the proposed changes to the guidelines. The commission shall review the projections of impact and shall make them available to other appropriate agencies of state government, including the Legislature, by October 1 of each year.

(b) On or after January 1, 1994, any legislation which:

1. Creates a felony offense;

2. Enhances a misdemeanor offense to a felony offense;

3. Moves a felony offense from a lesser offense severity level to a higher offense severity level in the offense severity ranking chart in s. 921.0012; or

4. Reclassifies an existing felony offense to a greater felony classification

must provide that such a change result in a net zero sum impact in the overall prison population, as determined by the Criminal Justice Estimating Conference, unless the legislation contains a funding source sufficient in its base or rate to accommodate such change or a provision which specifically abrogates the application of this paragraph.

History.—ss. 1,2,3, ch. 82-145; s. 2, ch. 83-87; s. 176, ch. 83-216; s. 2, ch. 84-328; s. 1, ch. 86-273; s. 2, ch. 87-110; s. 5, ch. 88-96; s. 8, ch. 88-122; s. 2, ch. 88-131; s. 3, ch. 89-526; s. 6, ch. 90-211; s. 69, ch. 91-110; s. 1, ch. 91-239; s. 1, ch. 92-135; s. 5, ch. 93-406.

[1]**Note.**—Section 5, Ch. 93-406, provides for applicability to sentencing for offenses committed on or after January 1, 1994.

Section 921.001(10)
Florida Statutes (1987)
[1987 Fla. Laws ch. 87-110, § 2]

(10) A person convicted of crimes committed on or after October 1, 1983, or any other person sentenced pursuant to sentencing guidelines adopted under this section shall be released from incarceration only:

(a) Upon expiration of his sentence;

(b) Upon expiration of his sentence as reduced by accumulated gain-time; or

(c) As directed by an executive order granting clemency.

The provisions of chapter 947 shall not be applied to such person.

History. - ss. 1, 2, 3, ch. 82-145; s. 2, ch. 83-87; s. 176, ch. 83-216; s. 2, ch. 84-328; s. 1, ch. 86-273; s. 2, ch. 87-110.

Section 921.001(11)
Florida Statutes (Supp. 1988)
[1988 Fla. Laws ch. 88-122, § 8]

(11) A person who is convicted of a crime committed on or after October 1, 1988, shall be released from incarceration only:

(a) Upon expiration of his sentence;

(b) Upon expiration of his sentence as reduced by accumulated gain-time;

(c) As directed by an executive order granting clemency;

(d) Upon attaining the provisional release date; or

(e) Upon placement in a conditional release program pursuant to s. 947.1405.

History.— ss. 1, 2, 3, ch. 82-145; s. 2, ch. 83-87; s. 176, ch. 83-216; s. 2, ch. 84-328; s. 1, ch. 86-273; s. 2, ch. 87-110; s. 5, ch. 88-96; s. 8, ch. 88-122; s. 2, ch. 88-131.

Section 944.276
Florida Statutes (1987)
[1987 Fla. Laws ch. 87-2, § 1]

[1]944.276 Administrative gain-time.—

(1) Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary may grant up to a maximum of 60 days administrative gain-time equally to all inmates who are earning incentive gain-time, unless such inmates:

(a) Are serving a minimum mandatory sentence under s. 775.082(1) or s. 893.135;

(b) Are serving the minimum mandatory portion of a sentence enhanced by s. 775.087(2);

(c) Were convicted of sexual battery or any sexual offense specified in s. 917.012(1) and have not successfully completed a program of treatment pursuant to s. 917.012; or

(d) Were sentenced under s. 775.084.

(2) The authority granted to the secretary shall continue until the inmate population of the correctional system reaches 97 percent of lawful capacity, at which time the authority granted to the secretary shall cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

History. - ss. 1, 2, ch. 87-2.

[1]**Note.** - Expires effective July 1, 1988, pursuant to s. 2, ch. 87-2, and is scheduled for review by the Legislature before that date.

Section 944.277
Florida Statutes (Supp. 1988)
[1988 Fla. Laws ch. 88-122, § 5]

944.277 Provisional credits.—

(1) Whenever the inmate population of the correctional system reaches 97.5 percent of lawful capacity as defined in s. 944.096, the Secretary of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:

(a) Is serving a sentence which includes a mandatory minimum provision for a capital offense or drug trafficking offense and has not served the number of days equal to the mandatory minimum term less any jail-time credit awarded by the court;

(b) Is serving the mandatory minimum portion of a sentence enhanced under s. 775.087(2);

(c) Is convicted, or has been previously convicted, of committing or attempting to commit sexual battery, incest, or a lewd or indecent assault or act;

(d) Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, or aggravated battery, and a sex act was attempted or completed during commission of the offense;

(e) Is convicted, or has been previously convicted, of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery;

(f) Is convicted, or has been previously convicted, of committing or attempting to commit false imprisonment upon a child under the age of 13 and, in the course of

committing the offense, the inmate committed aggravated child abuse, sexual battery against the child; or a lewd, lascivious, or indecent assault or act upon or in the presence of the child; or

(g) Is sentenced, or has previously been sentenced under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender.

(2) The Secretary's authority to grant provisional credits in increments not exceeding 60 days will continue until the inmate population of the correctional system reaches 97 percent of lawful capacity, at which time the authority granted to the secretary will cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

(3) At such time as provisional credits are granted, the Department of Corrections shall establish a provisional release date for each eligible inmate incarcerated, which will be the tentative release date less any provisional credits granted.

(4) Any eligible inmate who is incarcerated on the effective date of an award of provisional credits shall receive such credits. Any inmate who is under any type of release supervision program of the department is not eligible for an award of provisional credits.

(5) Any inmate who is serving one or more sentences of imprisonment imposed as a result of an offense that occurred on or after July 1, 1988, and who receives 30 or more days of provisional credits must be released into the provisional release supervision program on his provisional release date, unless such inmate is also serving a sentence for an offense that occurred before July 1, 1988. Inmates who are released into the provisional release supervision program are not eligible for any additional gain-time. If an inmate has received a term of probation or community control to be

served after his release from incarceration, the period of probation or community control supervision must be substituted for the period of supervision under the provisional release supervision program.

(6) The terms and conditions of provisional release supervision must be specified in writing, and a copy must be given to the inmate at the time of his release from incarceration. The term of supervision must be equal to the number of provisional credits accrued, but may not exceed 90 days unless extended as provided in subsection (7).

(7) If an inmate violates any term or conditio of provisional release supervision, the Department of Corrections may take any of the following actions:

(a) Continue provisional release supervision.

(b) Extend the term of supervision not to exceed the total number of provisional credits the inmate has accumulated.

(c) Terminate the provisional release supervision and return the inmate to prison. If an inmate is returned to prison, credits accumulated as of the date of release to the provisional release supervision program may be canceled as prescribed by department rule.

(8) If an inmate absconds from provisional release supervision, the Department of Corrections may issue a warrant for his arrest as provided by s. 944.405. The failure of an inmate to report to the designated parole and probation office within 10 days after his release from incarceration constitutes a violation of the provisional release supervision program and will result in issuance of a warrant for arrest of the inmate.

(9) The Department of Corrections shall adopt rules to implement the provisional release supervision program.

History.—s. 5, ch. 88-122.

Section 944.277(1)
Florida Statutes (Supp. 1992)
[1992 Fla. Laws ch. 92-310, § 12]

944.277 Provisional Credits.—

(1) Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity, the Secretary of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:

(a) Is serving a sentence which includes a mandatory minimum provision for a capital offense or drug trafficking offense and has not served the number of days equal to the mandatory minimum term less any jail-time credit awarded by the court;

(b) Is serving the mandatory minimum portion of a sentence enhanced under s. 775.087(2);

[1](c) Is convicted, or has been previously convicted, of committing or attempting to commit sexual battery, incest, or any of the following lewd or indecent assaults or acts: masturbating in public; exposing the sexual organs in a perverted manner; or nonconsensual handling or fondling of the sexual organs of another person;

(d) Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, or aggravated battery, and a sex act was attempted or completed during commission of the offense;

(e) Is convicted, or has been previously convicted, of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery or a sex act was attempted or

completed during commission of the offense;

(f) Is convicted, or has been previously convicted, of committing or attempting to commit false imprisonment upon a child under the age of 13 and, in the course of committing the offense, the inmate committed aggravated child abuse; sexual battery against the child; or a lewd, lascivious, or indecent assault or act upon or in the presence of the child;

(g) Is sentenced, or has previously been sentenced, or has been sentenced at any time under s. 775.084, or has been sentenced at any time in another jurisdiction as a habitual offender;

(h) Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, aggravated battery, kidnapping, manslaughter, or murder against an officer as defined in s. 943.10(1),(2),(3),(6),(7),(8), or (9); or against a state attorney or assistant state attorney; or against a justice or judge of a court described in Article V of the State Constitution; or against an officer, judge, or state attorney employed in a comparable position by any other jurisdiction; or

(i) Is convicted, or has been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.04(1),(2),(3), or (4); or has ever been convicted of any degree of murder in another jurisdiction; or

(j) Is serving a concurrent sentence in another state or federal jurisdiction.

In making provisional credit eligibility determinations, the department may rely on any document leading to or generated during the course of the criminal proceedings involving the inmate, including, but not limited to, any

presentence or postsentence investigation or any information contained in arrest reports relating to circumstances of the offense.

History.—s. 5, ch. 88-122; s. 4, ch. 89-100; s. 5, ch. 89-526; s. 5, ch. 89-531; s. 2, ch. 90-77; s. 1, ch. 90-186; s. 14, ch. 90-337; s. 14, ch. 91-280; s. 12, ch. 92-310.

[1]Note.—

A. Section 3, ch. 90-186, provides that "[a] person who is convicted, or has been previously convicted, of committing prior to the effective date of this act a lewd or indecent assault or act specified in section 944.277(1)(c), Florida Statutes, is eligible for provisional credits. However, a person who is convicted or has been previously convicted, of committing or attempting to commit a lewd or indecent assault or act as a result of masturbating in public, exposing the sexual organs in a perverted manner, or nonconsensual handling or fondling of the sexual organs of another person is not eligible for provisional credits."

B. Section 19, ch. 90-337, provides that "[e]ffective July 1, 1990, an inmate convicted of a lewd or indecent act not listed in s. 944.277(1)(c), Florida Statutes, shall receive retroactive benefit of all provisional credit awards made during the service of his sentence, provided that he is not otherwise ineligible for, or excluded from, receiving such an award." Chapter 90-337 was signed into law on July 3, 1990.

Section 944.598
Florida Statutes (Supp. 1986)
[1986 Fla. Laws ch. 86-46, § 1]

944.598 Emergency release of prisoners.—

(1) The Department of Corrections shall advise the Governor of the existence of a state of emergency in the state correctional system whenever the population of the state correctional system exceeds 99 percent of the lawful capacity of the system for males or females, or both. In conveying this information, the secretary of the department shall certify the rated design capacity, maximum capacity, lawful capacity, system maximum capacity, and current population of the state correctional system. When the Governor verifies such certification by letter, the secretary shall declare a state of emergency.

(2) Following the declaration of a state of emergency, the sentences of all inmates in the system who are eligible to earn gain-time shall be reduced by the credit of up to 30 days gain-time, in 5-day increments, as may be necessary to reduce the inmate population to 98 percent of lawful capacity of the system.

(3) If a state of emergency still exists 15 days after the credit of gain-time pursuant to subsection (2), the secretary of the department and the Parole and Probation Commission, as appropriate to their respective functions, shall authorize, prior to scheduled release by parole, gain-time, or expiration of sentence, the early termination of incarceration of those inmates confined in state correctional facilities and serving sentences of 3 years or less, unless sentenced pursuant to s. 775.087 or s. 893.135, who are within the last 60 days prior to release by parole, gain-time, or expiration of sentence. The secretary and the commission

shall release such inmates by applying, in 5-day increments, credit for time served to all in this category.

(4) Within 15 days after the declaration of a state of emergency, the department shall supply the commission with the names of those inmates in the following categories, who shall be considered for compulsory conditional release:

(a) Any inmate confined in a state correctional facility with a sentence of 3 years or less, unless serving a mandatory minimum sentence, who is within the last 6 months prior to his release.

(b) Any inmate confined in a state correctional facility with a sentence of more than 3 years but less than 8 years, unless serving a mandatory minimum sentence, who is within the last year prior to his release.

(c) Any inmate confined in a state correctional facility with a sentence of 8 years or more, unless serving a mandatory minimum sentence, who is within the last 18 months prior to his release.

As used in this subsection, the term "compulsory conditional release" means a release from incarceration by commission action specifying the terms of release, including the period of time the person is subject to such conditions as the commission determines and subject to supervision as if on parole, but in no event may such supervision extend beyond the maximum term or terms for which he was actually sentenced. The commission shall consider all inmates not otherwise ineligible for parole who have maintained satisfactory institutional behavior and who are not serving a term of imprisonment for any "forcible felony" as defined in s. 776.08, for drug trafficking under s. 893.135, or as a habitual felony offender under s. 775.084.

(5) A violation of the terms or conditions of a compulsory conditional release pursuant to subsection (4)

may render the person released liable to arrest and return to prison to serve out the term for which he was sentenced. However, an offender whose compulsory conditional release is revoked may, at the discretion of the commission, be credited with any portion of his time he has satisfactorily served while on release. For the purposes of this section, the releasee shall be subject to the provisions of ss. 947.22, 947.23, and 947.26, as though such releasee were on parole.

(6) The authority granted in this section shall cease whenever the secretary certifies to the Governor that the level of inmate population has remained at less than 98 percent of the lawful capacity of the system for 5 consecutive days.

(7) As used in this section, the term:

(a) "State correctional system" means the system as defined in s. 944.02.

(b) "Lawful capacity" of the state correctional system means the total capacity of all institutions and facilities in the prison system as determined either by the Legislature or by the courts.

History. - ss. 3, 5, ch. 83-131; s. 1, ch. 86-46.